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HOUSE BILL 770

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

W. Ken Martinez

AN ACT

**RELATING TO MEDIATION; ENACTING THE ALTERNATIVE DISPUTE
RESOLUTION PROCEDURES ACT; ESTABLISHING CONFIDENTIALITY FOR
MEDIATION COMMUNICATIONS; PROVIDING EXCEPTIONS FOR DISCLOSURE
OF MEDIATION COMMUNICATIONS.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. SHORT TITLE.--This act may be cited as the
"Alternative Dispute Resolution Procedures Act".**

**Section 2. DEFINITIONS.--As used in the Alternative
Dispute Resolution Procedures Act:**

A. "mediation" means a process in which a mediator:

**(1) facilitates communication and negotiation
between parties to assist them in reaching a voluntary
agreement regarding their dispute; or**

(2) promotes reconciliation, settlement or

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1 understanding between and among parties;

2 B. "mediation communication" means a statement,
3 whether oral or in a record or verbal or nonverbal, that occurs
4 during a mediation or is made for purposes of considering,
5 conducting, participating in, initiating, continuing or
6 reconvening a mediation or retaining a mediator;

7 C. "mediation party" means a person who
8 participates in a mediation and whose agreement is necessary to
9 resolve the dispute;

10 D. "mediation program" means a program that
11 provides mediation services and is created or administered by a
12 court or court agency, a government or governmental
13 subdivision, agency or instrumentality of this state or a
14 tribal court, government or agency;

15 E. "mediator" means an individual who:

16 (1) holds himself out as a mediator and who
17 conducts a mediation;

18 (2) the parties agree to use as a mediator and
19 who conducts a mediation; or

20 (3) is an observer who is permitted by the
21 parties to watch and listen to the mediation process for
22 educational or other administrative purposes;

23 F. "nonparty participant" means a person, other
24 than a party or mediator, who participates in or is present
25 during the mediation, including a person consulted by a party

1 to assist the party with evaluating, considering or generating
2 offers of settlement;

3 G. "person" means an individual, corporation,
4 business trust, estate, trust, partnership, limited liability
5 company, association, joint venture, government or governmental
6 subdivision, agency or instrumentality, public corporation or
7 any other legal or commercial entity;

8 H. "proceeding" means:

9 (1) arbitration or a judicial, administrative
10 or other adjudicative process, including related pre-hearing
11 and post-hearing motions, conferences and discovery; or

12 (2) a legislative hearing or similar process;

13 I. "record" means information that is inscribed on
14 a tangible medium or that is stored in an electronic or other
15 medium and is retrievable in perceivable form; and

16 J. "sign" means:

17 (1) to execute or adopt a tangible symbol with
18 the present intent to authenticate a record; or

19 (2) to attach or logically associate an
20 electronic symbol, sound or process to or with a record with
21 the present intent to authenticate a record.

22 Section 3. SCOPE. --

23 A. Except as otherwise provided in Subsection B of
24 this section, the Alternative Dispute Resolution Procedures Act
25 applies to all mediators, nonparty participants, mediation

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1 parties and a mediation in which:

2 (1) the mediation parties are required to
3 mediate by statute or court or administrative agency rule or
4 are referred to mediation by a court, administrative agency or
5 arbitrator; or

6 (2) the mediation parties and the mediator
7 agree to mediate and the mediation is evidenced by a record
8 that is signed by the mediation parties.

9 B. The Alternative Dispute Resolution Procedures
10 Act does not apply to a mediation:

11 (1) relating to the establishment,
12 negotiation, administration or termination of a collective
13 bargaining relationship;

14 (2) relating to a dispute that is pending
15 pursuant to or is part of the processes established by a
16 collective bargaining agreement, except that the Alternative
17 Dispute Resolution Procedures Act applies to a mediation
18 arising out of a dispute that has been filed with an
19 administrative agency or court; or

20 (3) conducted by a judge who might make a
21 ruling on the case.

22 Section 4. CONFIDENTIALITY. -- Except as otherwise provided
23 in the Alternative Dispute Resolution Procedures Act or by
24 applicable judicial court rules, all mediation communications
25 are confidential, not subject to disclosure and shall not be

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1 used as evidence in any judicial or administrative proceeding.

2 Section 5. EXCEPTIONS--ADMISSIBILITY--DISCOVERY.--

3 A. Mediation communications are not confidential
4 pursuant to the Alternative Dispute Resolution Procedures Act
5 if they:

6 (1) are contained in an agreement reached by
7 the mediation parties during a mediation, including an
8 agreement to mediate, and the agreement is evidenced by a
9 record signed by the mediation parties, except when parts of
10 the agreement are designated by the mediation parties to be
11 confidential;

12 (2) are communications that all mediation
13 parties agree may be disclosed, as evidenced by a record signed
14 by all parties prior to or at the mediation;

15 (3) threaten or lead to actual violence in the
16 mediation or reveal the intent of a mediation party to commit a
17 felony or inflict bodily harm to himself or another person, or
18 to disprove a felony charge;

19 (4) are required by law to be made public or
20 otherwise disclosed; or

21 (5) relate to abuse, neglect or criminal
22 activity that is not the subject of the mediation.

23 B. Mediation communications may be disclosed if a
24 court, after hearing in camera and for good cause shown, orders
25 disclosure of evidence that is sought to be offered and is not

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1 otherwise available in an action on an agreement arising out of
2 a mediation evidenced by a record. Nothing in this subsection
3 shall require disclosure by a mediator of any matter related to
4 mediation communications.

5 C. Mediators are not subject to subpoena and shall
6 not be required to make disclosure, either through discovery or
7 testimony at trial, of any matter related to mediation
8 communications, except pursuant to Paragraphs (3) through (5)
9 of Subsection A and Paragraphs (3) and (4) of Subsection D of
10 this section.

11 D. Nothing in the Alternative Dispute Resolution
12 Procedures Act shall prevent:

13 (1) the discovery or admissibility of any
14 evidence that is otherwise discoverable or admissible, merely
15 because the evidence was presented during a mediation;

16 (2) the gathering of information for research
17 or educational purposes or for the purpose of evaluating or
18 monitoring the performance of a mediator; provided that the
19 mediation parties or the specific circumstances of the dispute
20 of the mediation parties are not identified or identifiable;

21 (3) a court or court agency, a government or
22 governmental subdivision, agency or instrumentality of this
23 state or a tribal court, government or agency, when conducting
24 a mediation program under its auspices, from ordering that
25 different or additional rules of confidentiality shall apply to

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1 the mediation; or
2 (4) mediation parties from agreeing in writing
3 to additional or different confidentiality protections prior to
4 the mediation, subject to Paragraphs (3) through (5) of
5 Subsection A and Subsection C of this section.

6 Section 6. EFFECT OF AGREEMENT. --

7 A. If the mediation parties reach a settlement
8 agreement in a pending proceeding and the agreement is
9 evidenced by a record signed by the mediation parties, the
10 agreement is enforceable in the same manner as any other
11 written contract. The agreement shall not affect any
12 outstanding court order unless the terms of the agreement are
13 incorporated into a subsequent order.

14 B. A court, administrative agency or arbitrator, in
15 its discretion, may incorporate the terms of the agreement in
16 the order or other document disposing of the matter.

17 Section 7. EFFECTIVE DATE. --The effective date of the
18 provisions of this act is July 1, 2005.